

PUBLICATION INFORMATION:

Webner v. Titan Distribution, Inc., 2002 WL 1283756 (N.D. Iowa May 14, 2002)
(Unpublished decision)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

RANDALL HERBERT WEBNER,

Plaintiff,

vs.

TITAN DISTRIBUTION, INC.,

Defendant.

No. C97-3101-MWB

**ORDER REGARDING PLAINTIFF'S
APPLICATION FOR ATTORNEY
FEES**

I. INTRODUCTION AND BACKGROUND

Plaintiff Randy Webner ("Webner") brought suit against his former employer defendant Titan Distribution, Inc. ("Titan") claiming that Titan had discriminated against him because he had a disability, a record of a disability, or a perceived disability in violation of the federal Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101 *et seq.*, and that Titan retaliated against him for pursuing a workers' compensation claim by terminating him or laying him off. This case was tried before a jury beginning February 14, 2000. On February 17, 2000, the jury returned a verdict in favor of Webner, finding that Webner had been terminated by Titan as a result of his disability, a perceived disability, and a record of disability. The jury also found that Webner had been terminated by Titan in retaliation for pursuing a workers' compensation claim. The jury awarded Webner \$13,771.00 for lost wages, \$12,500.00 for emotional distress damages on the disability claim, and \$12,500.00 for emotional distress damages on the retaliation claim. The jury also returned a verdict of \$100,000.00 in punitive damages on each of the two claims. After the court entered judgment on the verdict, Titan moved for judgment as a matter of law or, alternatively, a new trial, which the court denied. The court also granted Webner's request

for attorneys' fees and expenses. *Webner v. Titan Distrib., Inc.*, 101 F. Supp.2d 1215, 1239 (N.D. Iowa 2000), *affirmed in part and reversed in part*, 267 F.3d 828, 838 (8th Cir. 2001). Titan then appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit Court of Appeals reversed the court's denial of Titan's motion for judgment as a matter of law as to the punitive damages awarded on both the ADA claim and the state law retaliation claim but in all other respects affirmed the judgment of the court. *Webner v. Titan Distrib., Inc.*, 267 F.3d 828, 838 (8th Cir. 2001). Plaintiff Webner has now filed an application for attorneys' fees and expenses related to the appeal. Plaintiff Webner seeks an award of \$17,061.00 for attorneys' fees and \$9,004.62 for expenses. Titan has filed a timely resistance to this motion.

II. LEGAL ANALYSIS

A. Plaintiff's Request For Fees and Expenses

1. Fees claimed

Plaintiff Webner seeks an award of \$17,061.00 for attorneys' fees and \$9,004.62 for expenses. The number of hours claimed, and the hourly rate billed by plaintiff's attorney, Mr. Mark D. Sherinian, is 119.55 hours at an hourly rate of \$175.00. Plaintiff Webner is also claiming nine hours for work done by a law clerk employed by Mr. Sherinian at an hourly rate of \$45.00 per hour. Mr. Sherinian has reduced the number of hours claimed by twenty percent to take into account his lack of success on the issue of punitive damages. Mr. Webner has included in his claimed expenses, attorneys' fees for attorney Mike Carroll in the sum of \$5,610 and \$401.95 in expenses for Mr. Carroll. The number of hours claimed, and the hourly rate billed by Mr. Carroll is 34 hours at an hourly rate of \$165.00.¹

¹The court notes that Mr. Sherinian only submitted 34 hours of Mr. Carroll's billing as an expense. Mr. Carroll's records reflect that he billed Mr. Sherinian for 37.75 hours
(continued...)

The court has discussed the standards by which fees are awarded in its prior decisions, including, for example, *West v. Aetna Life Ins. Co.*, 188 F. Supp.2d 1096, 1098-1100 (N.D. Iowa 2002); *Rural Water Sys. No. 1 v. City of Sioux Ctr., Iowa*, 38 F. Supp. 2d 1057, 1062-63 (N.D. Iowa 1999), *Schultz v. Amick*, 955 F. Supp. 1087 (N.D. Iowa 1997), and *Houghton v. Sipco, Inc.*, 828 F. Supp. 631 (S.D. Iowa), *vacated on other grounds*, 38 F.3d 953 (8th Cir. 1994). Thus, the court will not engage in another detailed recitation of applicable standards. Instead, suffice it to say that “a prevailing plaintiff “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.”” *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting S. Rep. No. 94-1011, p. 4 (1976), in turn quoting *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968)); *accord Schultz*, 955 F. Supp. at 1109. Fees are usually calculated according to the “lodestar” method, which multiplies hours reasonably expended by a reasonable hourly rate. *West*, 188 F. Supp.2d at 1099; *Schultz*, 955 F. Supp. at 1110. Reductions may be made, however, for such things as partial success, duplicative hours or hours not reasonably expended, *see id.* at 1111-12, 1114-16, or for “block billing” or poor record-keeping. *See Houghton*, 828 F. Supp. at 643-44.

a. Reasonable hourly rate

Titan does not challenge the hourly rate billed by Mr. Sherinian, and the court agrees that his hourly rate is reasonable, in light of his substantial expertise and experience, especially in litigating employment discrimination claims in federal court. Titan does, however, challenge the hourly rate billed by Mr. Carroll, because it argues that Mr. Carroll failed to submit sufficient evidence to justify his proposed hourly rate. Therefore, Titan argues that Mr. Carroll’s hourly rate should be reduced to \$125.00 per hour. The court does

¹(...continued)
of work.

not agree. Although plaintiff Webner did not submit any evidence as to Mr. Carroll's ordinary billing rate in his fee application, this deficiency was obviated by plaintiff Webner's filing the affidavits of Mr. Carroll and attorney David H. Goldman in support of his fee application. Mr. Carroll avers that his normal hourly rate is \$165.00 per hour, and Mr. Goldman attests that Mr. Carroll's customary hourly rate of \$165.00 per hour is consistent with market rates and practices in Des Moines, Iowa. In light of this, and the fact that Mr. Carroll has been practicing law for approximately eleven years in Des Moines, with a general litigation practice in which most of his work is devoted to employment discrimination and civil rights matters, the court finds that a rate of \$165.00 per hour is fair and reasonable for an attorney with Mr. Carroll's level of experience and training in the area of employment litigation.² Thus, the court finds no ground for reductions in this step of the "lodestar" calculation.

b. Reduction for duplicative efforts and time not reasonably compensable

Titan challenges the number of hours claimed by Mr. Carroll. Specifically, Titan argues that because both Mr. Sherinian and Mr. Carroll went to St. Louis for oral arguments, Mr. Carroll should not also be able to bill Titan for this time because it would be duplicative. Titan, therefore, requests that the hours claimed by Mr. Carroll should be reduced by 32 hours and paid for only a total of two hours work.

The court has some skepticism and reservation whether any of Mr. Carroll's time is compensable. First, the court seriously doubts whether, had Mr. Webner been required to foot the bill for Mr. Carroll's time, Mr. Webner would have approved of Mr. Sherinian's "hiring" Mr. Carroll, at \$165 per hour, to assist him in presenting his oral arguments before the Eighth Circuit Court of Appeals. Furthermore, the court has serious doubts about

²The court notes that Mr. Carroll also practiced law in Albuquerque, New Mexico, for two years before he began practicing law in Iowa.

whether most lawyers who assist another lawyer in a different firm, either by taking part in moot oral arguments or helping a friend with oral argument strategy, are paid for their services. This is the type of activity that lawyers have traditionally helped one another with, without the expectation of charging a fee. The court notes that while Mr. Sherinian's billing for pre-trial and trial activities was conservative and frugal, his billing for appellate work was prolific. The court wonders whether this obvious change in billing was influenced by Webner's change in status to a prevailing party. Merely because Mr. Webner prevailed at trial, thereby triggering the ADA's fee shifting provision, does not cause this case to morph into a full employment act for Mr. Sherinian and his legal colleagues. As a general proposition, it may have been reasonable to use Mr. Carroll as a sounding board, and for Mr. Sherinian to reimburse him for his time. However, it is unreasonable to shift all of these costs to Titan under the facts presented here. Given Mr. Sherinian's expertise in the field of employment discrimination law, the court has reservations about the need for Mr. Sherinian to seek counsel from Mr. Carroll, an admittedly less experienced employment discrimination lawyer. Indeed, it appears that Mr. Carroll's actions were more in keeping with that of a personal chauffeur and valet for Mr. Sherinian than in providing any real compensable service. Therefore, the court finds that it would be unreasonable and unfair to charge Titan for the vast majority of Mr. Carroll's time.

Reviewing the billing records submitted by Mr. Carroll, the court finds that most of the time challenged by Titan is excessive or duplicative, and only a small portion of it is reimbursable. It must be remembered that fee-shifting statutes are designed to "ensure effective access to the judicial process for persons with civil rights grievances, not to serve as a full employment or continuing education programs for lawyers and paralegals." *Lipsett v. Blanco*, 975 F.2d 934, 938 (1st Cir. 1992) (citation and internal quotation marks omitted). After carefully reviewing the time records of Mr. Carroll and Mr. Sherinian, the court is left with a firm and abiding conviction that there was a great deal of unnecessary duplication

of effort between Mr. Carroll and Mr. Sherinian. The court is open to the possibility that appellate counsel may be assisted in preparing for his or her oral advocacy by engaging another attorney to aide in plotting strategy and otherwise preparing for oral argument. However, the records submitted by Mr. Carroll clearly indicate that he expended time that was not reasonably required in order to perform the function of a sounding board for Mr. Sherinian. Specifically, the court finds that the number of hours charged by Mr. Carroll are excessive for the task at hand. It is unreasonable to spend 34 hours aiding another lawyer in the preparation of a fifteen minute oral argument. Moreover, the court finds that it was unnecessary for Mr. Carroll to travel to St. Louis with Mr. Sherinian for oral arguments and unfair to attempt to shift those costs to Titan. While having Mr. Carroll travel to St. Louis was no doubt a personal convenience for Mr. Sherinian, it is one which was unnecessary and that Titan should not have to bear. In addition, the court is troubled by what appears to be double billing. Specifically, on April 11, 2002, Mr. Carroll billed not only for the 6.5 hours required to drive to St. Louis from Des Moines, but that he also charged 5.5 hours for “[p]reparations for oral argument strategy” and “outline oral argument.” Mr. Sherinian’s billing statement similarly reflects that he billed 6.5 hours for transportation along with 2.5 hours for conferencing with Mr. Carroll regarding strategy and 3 hours for reviewing his brief and revising his outline. Because Mr. Sherinian states in his reply brief that “during the trip to St. Louis, Mr. Carroll drove and peppered Mr. Sherinian with creative questions,” Plaintiff’s Reply Br. at p.3, it appears that Mr. Sherinian and Mr. Carroll are both billing for the time when they were in transit to St. Louis and at the same time billing a substantial portion of the time in transit as time spent in oral argument preparations. Even if that is not the case, and Mr. Sherinian and Mr. Carroll devoted 5.5 hours to oral argument preparations in addition to the 6.5 hours in travel time, there is no reason why the 6.5 hour trip to St. Louis could not have been used productively to prepare for oral arguments, thereby eliminating the need for Mr. Sherinian and Mr. Carroll to bill another combined

eleven hours. The court believes that counsel as experienced in employment discrimination law as Mr. Carroll could have performed his duties as a sounding board and strategist for Mr. Sherinian in no more than four hours. This amount of time would permit Mr. Carroll to review the briefs and strategize with Mr. Sherinian before he left for St. Louis. Thus, there was no reason nor need to bring Mr. Carroll along for oral arguments. Therefore, the court will reduce the number of hours claimed by Mr. Carroll by 30 hours, leaving a total of four hours.

With respect to the number of hours claimed by Mr. Sherinian, Titan asserts that it was unnecessary for Mr. Sherinian to arrive one day before oral arguments were scheduled in this case in order to preview the oral arguments conducted the day before this case was to be argued. The court agrees. While viewing oral arguments conducted in other cases may be beneficial to the advocate, it can not be deemed reasonably necessary. Therefore, the court will reduce Webner's fee request by \$437.50 to reflect the 2.5 hours Mr. Sherinian claimed for previewing oral arguments in other cases.

c. Reduction for state law claim

Titan further seeks to reduce plaintiff Webner's fee claim to reflect the fact that Webner received damages for his claim of disability discrimination in violation of federal law, and he also received damages for his claim of wrongful termination in violation of Iowa public policy. Because there is no provision in Iowa common law that provides for an award of attorneys' fees in a wrongful termination case, Titan argues that a ten percent (10%) reduction is warranted. In the court's original fee award, the court found that much of the evidence submitted with respect to the disability discrimination claim was interrelated and did overlap with the evidence submitted on the wrongful termination claim, and therefore, found that a ten percent (10%) reduction in the fee award was appropriate. *Webner*, 101 F. Supp.2d at 1232. Likewise, the court finds that a ten percent (10%) reduction in the fee award is appropriate here to reflect the fact that there is no provision

in Iowa common law for an award of attorneys' fees.

d. Reduction for partial success

Titan also seeks to reduce plaintiff Webner's fee claim to reflect the fact that he only enjoyed partial success on appeal. Titan argues that a further reduction is warranted because the Eighth Circuit Court of Appeals found that award of punitive damages on both the ADA claim and the state retaliation claim were not supported by sufficient evidence. Titan contends that an eighty percent (80%) reduction is warranted because that is the percentage of the total damage award which was reversed on appeal.³ Webner concedes that a reduction on this ground is warranted, but argues that a twenty percent (20%) reduction is all that is warranted.

In its decision in *Jenkins v. Missouri*, 127 F.3d 709 (8th Cir. 1997) (extensive prior history omitted), the Eighth Circuit Court of Appeals explained:

Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed.2d 40 (1983), gives the paradigm for determining whether fees are compensable under section 1988 in cases in which the plaintiff has prevailed on some, but not all, of his claims. If any issues on which the plaintiff lost are unrelated to those on which he won, the unrelated issues must be treated as if they were separate cases and no fees can be awarded. See *id.* at 434-35, 103 S. Ct. at 1939-40. If, however, the claims on which the plaintiff lost are related to those on which he won, the court may award a reasonable fee. See *id.* The most important factor in determining what is a reasonable fee is the magnitude of the plaintiff's success in the case as a whole. See *id.* at 436, 103 S. Ct. at 1941; *Farrar v. Hobby*, 506 U.S. at 114, 113 S. Ct. at 574-75. If the plaintiff has won excellent results, he is entitled to a fully compensatory fee award, which will normally include time spent on related matters on which he

³This calculation fails to take into account the fact that plaintiff was also awarded attorneys' fees and expenses in the amount of \$46,261.59 which was affirmed on appeal. *Webner*, 267 F.3d at 838.

did not win. *See Hensley*, 461 U.S. at 435, 103 S. Ct. at 1940. If the plaintiff's success is limited, he is entitled only to an amount of fees that is reasonable in relation to the results obtained. *See id.* at 440, 103 S. Ct. at 1943. Finally, of course, any fees must be "reasonably expended," so that services that were redundant, inefficient, or simply unnecessary are not compensable. *See id.* at 434, 103 S. Ct. at 1939-40.

Id. at 716. This court previously noted that "[t]he success of the litigant determines not only whether [it] is a 'prevailing party' entitled to any fee award at all, but also is 'crucial' to determining the amount of any fee award." *Schultz*, 955 F. Supp. at 1111-12 (citing *Hensley*, 461 U.S. at 440). The court concludes that a reduction for partial success is appropriate here because Webner's success on his federal claim was only "partial." Therefore, the court will simply reduce the lodestar by a percentage to account for Webner's limited success. In determining the appropriate percentage, the court has considered that Webner's claim for punitive damages certainly was not the primary legal theory advanced by Webner in this lawsuit. Moreover, Webner succeeded on every other issue on appeal. Accordingly, the court finds that a reduction of twenty (20%) across-the-board reduction in hours for attorneys and law clerks is appropriate for the lack of success on Webner's punitive damage claims.

After making the reductions discussed above, the court finds that Mr. Sherinian is entitled to \$14,206.50. The court arrives at this amount by multiplying the total number of hours billed by Mr. Sherinian—119.55—by his hourly rate—\$175.00— for a total of \$20,921.25. Then, reducing this amount by 10% to reflect the time allocated to the wrongful termination claim and 20% to reflect the lack of success on Webner's punitive damage claims, the court subtracted \$6,276.38 from \$20,921.25 to arrive at a figure of \$14,644.87, which the court then had to further reduce by \$437.50, because this represented the time Mr. Sherinian spent previewing the oral arguments conducted in other cases. Thus, the court finds that Mr. Sherinian's total fee claim is \$14,207.37.

The court will also reduce the number of hours billed by Mr. Sherinian for his law clerk, using the same method it reduced the number of hours billed by Mr. Sherinian. Mr. Sherinian billed nine hours for work performed by his law clerk at \$45.00 per hour for a total fee claim of \$405.00. Reducing this amount by 30%, to reflect the 10% reduction for time allocated to the wrongful termination claim and 20% to reflect the lack of success on the punitive damage claims, the court subtracted \$121.50 from \$405.00 to arrive at a figure of \$283.50. Thus, the court finds that Mr. Sherinian's total fee award is \$14,490.87.

After making the reductions discussed, the court finds that Mr. Carroll is entitled to \$462.00. The court arrives at this amount by multiplying the total number of hours allowed by the court for Mr. Carroll—4—by his hourly rate—\$165.00— for a total of \$660.00. Then, the court reduced this amount by 10% to reflect the time allocated to the wrongful termination claim and 20% to reflect the lack of success on Webner's punitive damage claims. Thus, the court subtracted \$198.00 from \$660.00 to arrive at a figure of \$462.00. As a result, the court finds that Mr. Carroll's total fee claim is \$462.00.

Therefore, the court concludes that the total awarded to Webner for attorneys' fees is \$14,952.87 (\$14,490.87 in allowed fees for Mr. Sherinian + \$462.00 in allowed fees for Mr. Carroll = \$14,952.87).

2. Expenses claimed

Webner also requests \$9,004.02 for litigation expenses. However, of this amount, \$5610.00 represents Mr. Carroll's attorneys' fees which the court has already discussed above. Of the remaining \$3394.02 in claimed expenses, Titan takes issue with several items. First, Titan contests photocopying charges in the sum of \$459.27. Titan asserts that because these charges were not taxed as costs by the Eighth Circuit Court of Appeals pursuant to Federal Rule of Appellate Procedure 39, it would be improper to charge them to Titan. This argument focuses on the breadth of the term "costs" as used in Federal Rule of Appellate Procedure 39(a), which governs the award of costs for appeal. However,

because an award of “a reasonable attorneys' fee, including litigation expenses, and costs,” under 42 U.S.C. § 12205, is a decision distinct from the decision on the merits of an appeal, the filing of a petition for appellate attorneys’ fees and costs in the district court is not governed by Federal Rule of Appellate Procedure 39. Therefore, Titan’s objection to Webner’s photocopying costs is denied.

Titan also objects to the expenses incurred by having Mr. Carroll attend the oral arguments in St. Louis and with Mr. Sherinian’s having stayed for two nights in order to preview oral arguments in other cases. For the reasons discussed above, the court agrees that these expenses were unnecessary. Thus, the court will reduce Webner’s request for expenses by the following amounts: Mr. Carroll’s lodging costs in the sum of \$346.54; Mr. Carroll’s meals in the sum of \$55.42; and, Mr. Sherinian’s lodging for one night in the sum of \$163.28.⁴ As a result, the court will reduce Webner’s requested expenses by a total of \$565.24. Consequently, the total awarded to Webner for expenses is \$2828.78. Therefore, the court concludes that the total awarded to Webner for attorneys’ fees and expenses is \$17,781.65 (\$14,952.87 in allowed fees + \$2828.78 in allowed expenses = \$17,781.65).

III. CONCLUSION

For the reasons delineated above, the court concludes that plaintiff Webner is entitled to attorneys’ fees and expenses in the amount of **\$17,781.65**.

IT IS SO ORDERED.

DATED this 14th day of May, 2002.

⁴The court notes that because Mr. Carroll supplied the transportation to St. Louis for both himself and Mr. Sherinian, the court has not deducted that claimed expense.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA